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No. 84-780

In the Supreme Court of the United States

OCTOBER TERM, 1985

OTIS R. BOWEN, SECRETARY OF HEALTH AND HUMAN SERVICES, ET AL., APPELLANTS

v.

STEPHEN J. ROY, ET AL.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

REPLY BRIEF FOR THE APPELLANTS

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The district court has granted appellees an exemption from the *only* identification requirement that Congress has expressly imposed on applicants for and recipients of benefits under the AFDC and Food Stamp programs, based on its determination that appellees' religious objection to providing a social security number for their daughter outweighs the government's interest in administering these two massive social welfare programs in a manner that most clearly enables the government to verify statutory eligibility and to detect fraud and mismanagement. Appellees' attempts to portray this substantial intrusion on the prerogatives of Congress as insignificant are unavailing.

1. a. Appellees first argue (Br. 9-18) that this case can be decided on statutory grounds, contending that the express requirement contained in the AFDC and Food Stamp statutes for the provision of an SSN for each member of a household receiving benefits should be construed so as to permit religious exemp-

tions in order to effectuate the intent of Congress to provide benefits to the needy. Appellees' argument does violence to the most elementary principle of statutory construction.[1]

The language of the two statutes in question could not be more clear. Section 402(a)(25) of the Social Security Act, 42 U.S.C. 602(a)(25) (emphasis added), provides that a state AFDC plan "*must* • • • provide (A) that, *as a condition of eligibility* under the plan, *each* applicant for or recipient of aid *shall* furnish to the State agency his social security account number • • • and (B) that each State agency *shall utilize* such account numbers • • • in the administration of such plan." Section 16(e) of the Food Stamp Act of 1977, 7 U.S.C. 2025(e) (emphasis added), provides that the "Secretary [of Agriculture] and State agencies *shall* (1) *require, as a condition of eligibility for participation in the food stamp program,* that *each* household member furnish to the State agency their social security account number • • • and (2) *use* such account numbers in the administration of the food stamp program." Here, as in *TVA* v. *Hill*, 437 U.S. 153, 173 (1978), "[o]ne would be hard pressed to find a statutory provision whose terms were any plainer • • •." And, just as in *TVA* v. *Hill*, "[t]his language admits of no exception" (*ibid.*).

Notwithstanding the unambiguous language of the statutory provisions at issue, appellees urge the Court to reject a "literal construction" (Br. 10) in order to advance what appellees perceive as Congress's single-minded intent to provide benefits

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[1] Appellees rely on the "maxim • • • of statutory construction" that "statutes should be construed to avoid constitutional questions" (*United States* v. *Rutzhelder*, 442 U.S. 114, 122 (1979)). But such a construction is to be rendered " 'only when [it] is "fairly possible" from the language of the statute' " (*id.* at 122, quoting *Swain* v. *Pressley*, 430 U.S. 372, 378 n.11 (1977)). The rule does not "authoriz[e] a court in interpreting a statute to depart from its clear meaning" (*United States* v. *Sullivan*, 332 U.S. 689, 693 (1948)) or to " 'pervert[] the purpose of a statute • • •' or judicially rewrit[e] it" (*Aptheker* v. *Sec'y of State*, 378 U.S. 500, 515 (1964) (citation omitted)). See *Heckler* v. *Mathews*, No. 82-1050 (Mar. 5, 1984), slip op. 12. Appellees' reliance (Br. 15-16) on *United States* v. *Clark*, 445 U.S. 23 (1980), and *NLRB* v. *Catholic Bishop*, 440 U.S. 490 (1979), is therefore misplaced, because the statutes at issue in those cases were fairly susceptible to interpretations that avoided the need for constitutional adjudication. Such is not the case here.

needy individuals. Appellees urge the Court to elevate the words of grant in the two statutes, which evince Congress's intent to provide benefits to the needy, over the express words of limitation, which set conditions on the receipt of such benefits. But the Court is not free to pick and choose from among different parts of the statute, enforcing certain provisions and ignoring others. See, *e.g.*, *Schweiker* v. *Hansen*, 450 U.S. 785, 790 (1981). While it is true that Congress wanted to provide benefits to low-income persons, Congress also insisted on scrupulous adherence to the SSN requirement in order to determine and verify whether applicants for benefits are in fact needy. See *McElrath* v. *Califano*, 615 F.2d 434, 440 (7th Cir. 1980); *Green* v. *Philbrook*, 576 F.2d 440, 445 & n.3 (2d Cir. 1978).

b. Appellees' attempt to circumvent the plain language of the statutes involved is not aided by any legislative history. On the contrary, as we explained in our opening brief (at 15-16, 39), the available legislative history shows that Congress affirmatively decided to impose the SSN requirement in order to promote the governmental interests of detecting and preventing fraud, verifying eligibility, and efficiently managing enormous social welfare programs. Appellees nevertheless quote (Br. 11-12) excerpts from the legislative history of a different provision of the AFDC statute (Section 402(a)(26)(B) of the Social Security Act, 42 U.S.C. 602(a)(26)(B)), which requires applicants for and recipients of AFDC benefits to cooperate with the states in obtaining support payments owed by absentee parents for their dependent children. Appellees stress (Br. 12) that Congress did not intend to penalize dependent children with the loss of benefits simply because a mother might fail to assist the state in locating a missing father. Appellees' argument is totally beside the point and, if anything, cuts against their position here. First, the statutory provision on which they rely, unlike the SSN requirement, contains an express exemption from the duty to cooperate, applicable if the benefit applicant or recipient "is found to have good cause for refusing to cooperate as determined by the State agency in accordance with standards prescribed by the Secretary, which standards shall take into consideration the best interests of the child on whose behalf aid is claimed." Cf. Gov't Br. 38 & n.16. Thus, the decision to

cooperate with the government is not, as appellees would have it, left to the applicant or recipient. Moreover, if the applicant or recipient is found ineligible for benefits on account of his or her unexcused failure to cooperate, benefits for the child are paid not to the parent-applicant but to a representative payee (42 U.S.C. 602(a)(26)(B), 606(b)(2)).

Equally important, the "cooperation" requirement was imposed as a cost-saving measure. Congress was fully aware that it was spending vast amounts of unnecessary money on the AFDC program simply because absentee parents refused to comply with court-ordered support obligations. See 120 Cong. Rec. 41808 (1974) (remarks of Rep. Ullman); *id.* at 41809 (remarks of Rep. Ullman). The "cooperation" requirement, like the SSN requirement, was enacted to ensure that scarce government resources are allocated to those most truly in need and not unnecessarily diverted to persons having other sources of support. Both requirements serve similar functions; for purposes of this case, however, what is significant is that Congress chose *not* to permit any exceptions from the SSN requirement.[3]

c. Nor is there any merit to appellees' argument (Br. 14-15) that denial of welfare benefits to Little Bird of the Snow would constitute prohibited discrimination based on national origin or religion. Appellees first rely on Section 601 of Title VI of the Civil Rights Act of 1964, 42 U.S.C. 2000d, which prohibits discrimination on the basis of race, color, or national origin in any program or activity receiving federal financial assistance. Quite simply, this statute says nothing at all about religious discrimination. And to the extent appellees claim that application of the SSN requirement to them constitutes discrimination based on national origin, *i.e.*, Roy's Native American heritage, they are clearly wrong. First, it is now firmly established that

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[3] Appellees essentially admit (Br. 13) that there is no pertinent legislative history to support their position insofar as it pertains to the SSN requirement contained in the Food Stamp Act. What legislative history there is merely confirms Congress's overriding concern with fraud and abuse, a concern that was acted upon by making the SSN requirement in the Food Stamp Act mandatory. See generally 127 Cong. Rec. 24779-24788, 24848-24853 (1981); Staff of Senate Comm. on Agriculture, Nutrition, and Forestry, 99th Cong., 1st Sess., *The Food Stamp Program: History, Description, Issues, and Options* 213 (Comm. Print. 1985); see also pages 7-8, *infra*.

Title VI reaches only intentional discrimination; it does not, of its own force, encompass claims of disparate impact. See *Alexander* v. *Choate*, No. 83-727 (Jan. 9, 1985), slip op. 5. By no stretch of the imagination could the facially-neutral SSN requirement constitute intentional discrimination. In addition, it is doubtful that Roy's religious objection to the SSN requirement can be meaningfully associated with his national origin.[3] There is no testimony in the record that opposition to SSNs is a belief shared by any other Native American. Indeed, at least four other challenges to the SSN requirement have been brought by persons whose religious beliefs are wholly unrelated to their national origin.[4] These cases clearly demonstrate that a claim of discrimination based on religious creed is not transformed into a claim of discrimination based on national origin, within the purview of Title VI, simply because the person who possesses the religious belief at issue is of a particular national origin.

Appellees' case also is not advanced by the nondiscrimination provision contained in the Food Stamp Act, 7 U.S.C. 2020(c). Appellees offer no evidence to suggest that this statute has any meaning other than what is apparent from its face—food stamp benefits are to be distributed evenhandedly, without adverse discrimination *or* favoritism. Coverage of "disparate impact" discrimination is no more appropriately read into Section 2020(c) than it is into Title VI.

That this is the correct interpretation of the statute is supported by a comparison of Section 2020(c) with Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e *et seq.* As originally enacted, that Act simply barred religious discrimination in employment (42 U.S.C. 2000e-2). In 1972, the Act was amended

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[3] Roy testified that he derives his religious beliefs in part from association with other Native Americans descended from the Abenaki Tribe, in part from his own readings about religious teachings, and in part from "intuition" (J.A. 72). Roy did not testify that any of the sources for his religious beliefs (except, presumably, his "intuition") condemned the use of SSNs as being a violation of Abenaki or other Native American beliefs.

[4] See *Callahan* v. *Woods*, 736 F.2d 1269 (9th Cir. 1984); *Stevens* v. *Berger*, 428 F. Supp. 896 (E.D.N.Y. 1977); *Mullaney* v. *Woods*, 97 Cal. App. 3d 710, 158 Cal. Rptr. 902 (1979); *Atwood* v. *Idaho Dep't of Health & Welfare*, No. 83-3066 (D. Idaho filed May 23, 1983).

to require "reasonabl[e] accommodat[ions]" to employees' religious observances or practices if such accommodations could be made without "undue hardship on the conduct of the employer's business" (42 U.S.C. 2000e(j)). See *Trans World Airlines, Inc.* v. *Hardison*, 432 U.S. 63, 66 (1977). The Food Stamp Act, on the other hand, contains no "reasonable accommodation" provision. Thus, "accommodation" of appellees' religious beliefs, if any, must come from the Free Exercise Clause itself, and not from the Food Stamp Act.

The third statute on which appellees rely (Br. 14-15), the American Indian Religious Freedom Act (AIRFA), 42 U.S.C. 1996, is equally irrelevant. AIRFA was intended only to ensure that Native Americans receive the same protection under the First Amendment to which all Americans are entitled; it was not intended to grant Native Americans any greater rights. See *Wilson* v. *Block*, 708 F.2d 735, 746-747 (D.C. Cir.), cert. denied, 464 U.S. 956 (1983); 124 Cong. Rec. 21444-21445 (1978) (remarks of Rep. Udall); U.S. Dep't of the Interior, *American Indian Religious Freedom Act Report* 18 (1979) [hereinafter cited as *AIRFA Report*]. Moreover, Congress enacted AIRFA primarily to address three specific concerns, none of which is implicated here.[5]

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[5] Those concerns were (1) the denial of access to Native American religious sites, (2) restrictions on the p[illegible]vision of substances such as peyote, and (3) actual interference with Native [illegible]erican religious events. See S. Rep. 95-709, 95th Cong., 2d Sess. 2-4 (1978); H.R. Rep. 95-1308, 95th Cong., 2d Sess. 2-3 (1978).

Uncodified Section 2 of AIRFA, Pub. L. No. 95-341, 92 Stat. 470, required the President to direct federal agencies to evaluate their policies and procedures "in consultation with native traditional religious leaders" and report their findings to Congress within 12 months. This requirement was fulfilled when the President released the *AIRFA Report* in August 1979. Nevertheless, amici curiae National Congress of American Indians, *et al.* contend (Br. 41-50) that the Departments of Agriculture and Health and Human Services did not comply with Section 2 of AIRFA, because there is no evidence in the *AIRFA Report* to demonstrate that Agriculture and HHS expressly considered the effects, if any, of the SSN requirement on Native American religious practices. As we have previously noted, however, one need not be a Native American to assert a religious objection to the SSN requirement (see page 5 & note 4, *supra*). Thus, there would have been no reason to give special consideration to that requirement in conjunction with a study of the

2. The thrust of appellees' constitutional argument is that the government must accommodate their religious objection to supplying an SSN for Little Bird of the Snow unless it can show that the AFDC and Food Stamp programs would collapse if even one person were exempted from the SSN requirement. If that is indeed the government's burden, then we would agree that appellees should prevail in this case. Quite obviously, the government can "accommodate" one or a handful of individuals such as Little Bird of the Snow, simply by removing them from the system utilized to ensure fair and accurate payments to all other program participants. In our submission, however, nothing in this Court's Free Exercise jurisprudence requires the government to furnish welfare benefits on the basis of whatever information an applicant deems appropriate to provide. Our position is not, as appellees would have it (Br. 33), an attempted resurrection of the right/privilege dichotomy. Instead, we submit only that the Free Exercise Clause does not embrace religious claims to exemptions from providing *the very information needed to determine eligibility for benefits.* Moreover, the very growth of government that makes possible the provision of assistance to the less fortunate members of our society is inextricably intertwined with the need for a uniform system of program administration such as that mandated by Congress when it enacted the SSN requirement.

Appellees should prevail in this case only if the Court is willing to accept the notion that "a little bit of fraud"—either actual or potential—is something that Congress and the American public are required to accept in the name of Free Exercise. But it is quite clear that neither Congress nor the taxpayers are willing to shoulder that risk. As Representative Richmond explained in connection with the bill that made the SSN requirement mandatory for the Food Stamp program (127 Cong. Rec. 24783 (1981) (emphasis added)):

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impact of government programs on Native American religious practices. With only one known Native American professing a religious objection to the SSN requirement, it is quite fanciful to assume, as amici do (Br. 47-48), that further consultation with Indian religious leaders would have resulted in the discovery of Native American religious objections to the SSN requirement.

> We know that however generously motivated Americans may be to furnish resources to the poor to enable them to survive, * * * they understandably object if they believe that those resources are being abused or wasted. * * *.
>
> We want to be certain that the food stamp program is run as efficiently and as error-free as possible.
>
> *We want applicants and recipients alike constantly to be aware that the Congress does not and will not tolerate any refusal to disclose earnings accurately, and underreporting of welfare or other assistance program benefits, any efforts to evade the work requirement or any other attempts to take advantage of the program and dollars intended only for those who completely satisfy the stringent eligibility requirements set forth in sections 5 and 7 of the Food Stamp Act of 1977 and further tightened this year and in this bill.* [*]

In light of this statement of congressional intent, appellees are wrong in contending (Br. 36-37 & n.33) that this case is different from *United States* v. *Lee*, 455 U.S. 252 (1982). In *Lee*, the Court held that an Amish employer's objection to paying social security taxes was required to give way to the government's compelling interest in uniform administration of the tax system. In the instant case, appellees' objection to the SSN requirement must give way to the government's compelling interest in fair and evenhanded administration of public benefit programs—an interest that both is and is perceived to be undermined if the government must grant ad hoc exemptions to uniform standards of eligibility. The two cases are simply opposite sides of the same coin—*Lee* involved the credit side of the government ledger, while the instant case involves the debit side. In both situations, however, the possibility of "myriad exceptions flowing from a wide variety of religious beliefs" (455 U.S. at 260) is incompatible with Congress's crucial and compelling determination that there shall be no exceptions to the requirements it has enacted.

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[*] It is of no consequence that the SSN requirement is not an infallible device for ferreting out fraud and abuse. (We respond to appellees' baseless contention that the SSN requirement is virtually useless at note 7, *infra*.) What is important is Congress's determination that the SSN requirement is the single most effective means for achieving the governmental interests at stake.

a. Notwithstanding the importance attached by Congress to the SSN requirement, appellees, relying on isolated fragments of trial testimony [7] and inapposite cases, argue (Br. 20-26) that the governmental interests at stake in this case are not compelling. In the district court, appellees did not seriously dispute the substantial governmental interest, as a general matter, in requiring SSNs in the administration of the AFDC and Food Stamp programs; instead, their contention was that the government had no compelling interest in requiring an SSN from Little Bird of the Snow. See J.A. 53. Now, however, appellees contend (Br. 20-26) that the SSN requirement does not serve a compelling governmental interest in any respect.

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[7] As a preliminary matter, we question whether reliance on the trial record developed in this or any other single case constitutes a proper method of constitutional adjudication. In a wide variety of areas, this Court has recognized that a district court's "responsibility for making 'findings of fact' certainly does not authorize it to resolve conflicts in the evidence against the legislature's conclusion or even to reject the legislative judgment that without convincing statistics in the record to support it, the legislative viewpoint constitutes nothing more than what the District Court in this case said was 'pure speculation.'" *Vance* v. *Bradley*, 440 U.S. 93, 111 (1979) (quoting *Firemen* v. *Chicago, R.I. & P.R.R.*, 393 U.S. 129, 138-139 (1968)).

In any event, appellees paint a highly misleading picture of the utility of SSNs by citing to portions of the trial transcript out of context. For example, in describing the "weighted values" given to various pieces of identifying information, appellees assert (Br. 31) that "no points are subtracted" if an applicant's SSN is missing from his file. Appellees neglect to point out that no points are subtracted for *any* category of missing information, including name, date of birth, race or sex. J.A. 308. Instead, points are *added* for positive matches and *subtracted only* for positive "mismatches." *Ibid.* Appellees' statement (Br. 31) that "[t]he greatest value is attributed to name, birthdate and country of residence" is equally misleading, because the values to which appellees refer are *cumulative*. In fact, *far less* value is attributed to the other factors, when considered in isolation, than is attributed to the SSN alone. The only exception was explained at trial, but the explanation is conspicuously absent from appellees' brief. Thus, the manual on which appellees rely (which, despite appellees' protestations (Br. 30 n.23), is out of date and not even used in Pennsylvania (J.A. 321)), suggests a "weighted match value" of 270 points for country of residence and a "weighted match value" of 220 points for the SSN. But the government witness who explained the manual testified that the 270-point value assigned to country of residence was not a fixed value, because, the larger the country, the more likely it would be that two or more people in that country would share the same name. J.A. 313-315. In other

Appellees' argument is totally without merit. At the outset, we note that, if the Court were to agree that the government lacks a compelling interest in verifying eligibility and preventing and detecting fraud, there would be no occasion to balance appellees' religious claim against the government's interests. See, *e.g.*, *United States* v. *Lee*, 455 U.S. at 257-258, 259. In that event, appellees or others asserting similar claims could legitimately refuse to comply not only with the SSN requirement but also with any other informational requirements deemed

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words, the values in the manual are simply suggestions that may be adjusted up or down depending on particular circumstances. Appellees also fail to note the significant difference in the suggested values of a "mismatch" in county and SSN. A "mismatch" in county of residence calls for a subtraction of only 6 points, whereas a "mismatch" in SSN calls for a subtraction of 110 points.

In addition, appellees place entirely too much weight (Br. 29-30 n.24) on the uniqueness of Little Bird of the Snow's name. In the first place, she or her parents are perfectly free to change it at any time. Second, the very uniqueness of her name is itself a problem for the computer matching processes utilized by state welfare agencies. Because human beings make data entries into computers, the capacity to search for Little Bird of the Snow's records by name alone depends in large part on an individual computer operator's subjective assessment of what constitutes Little Bird of the Snow's first name and what constitutes her middle name. See J.A. 397-398. Unlike the nine-digit social security number, there is no standardized method for entering Little Bird of the Snow's name into any computer system.

Finally, appellees note (Br. 5-6 n.7) that information about Little Bird of the Snow -- to be precise, the existence of the SSN she has held since shortly after her birth but which was not revealed to the district court until the last day of trial -- was determined by entering her name and birthdate into a Social Security Administration computer. From this fact, appellees appear to argue (*ibid.*) that the possibility of conducting searches by name and birthdate obviates the need for SSNs. Appellees again neglect to mention a crucial fact, which is that the only information that can be discovered by the type of search conducted in this case is whether or not a person has an SSN. J.A. 387, 448-449. The computer file used for this purpose, known as the Alphabetical Identification Data Base (Alphident), obviously is necessary to process applications for SSNs and obviously must rely principally on a person's name and birthdate. But it serves none of the functions necessary in the administration of the AFDC and Food Stamp programs, such as verification of income and resources, because that type of information is maintained in other computer systems that are more commonly accessed by SSNs. In any event, appellees do not seriously dispute (see Br. 29 n.23) that automatic computer matches are virtually impossible without SSNs.

necessary to determine eligibility for benefits. Religious objections to the use of names, birthdates, addresses, or any other identifying information all would have to be honored, because, by hypothesis, there would be no countervailing governmental interest of sufficient magnitude to override whatever religious claims might be advanced. The absurdity of this proposition is self-evident, but it would be the inevitable result of acceptance of appellees' argument that the governmental interests in this case are not compelling.

It is not surprising, therefore, that every court that has considered the issue, including the court below, has concluded that the government does indeed have a compelling systemic interest in the SSN requirement. See J.S. App. 15a, 18a, 32a; *Alcaraz* v. *Block*, 746 F.2d 593, 606 (9th Cir. 1984); *Callahan* v. *Woods*, 736 F.2d 1269, 1274 (9th Cir. 1984); *Mullaney* v. *Woods*, 97 Cal. App. 3d 710, 158 Cal. Rptr. 902 (1979); *cf. McElrath* v. *Califano*, 615 F.2d at 439-440 (SSN requirement both rationally related and *essential* to effective administration of AFDC program).[9] Indeed, appellees' contention that the government lacks a compelling interest in verifying eligibility, preventing and detecting fraud, and administering massive welfare programs effectively and efficiently borders on the frivolous. Appellees rely (Br. 20-21) on *Thomas* v. *Review Bd.*, 450 U.S. 707 (1981); and *Sherbert* v. *Verner*, 374 U.S. 398, 407 (1963), in which the Court held that avoidance of the *unsubstantiated potential* for fraud and abuse is not a compelling state interest. Here, by contrast, it is undisputed that fraud and abuse in federal welfare programs are real and substantial problems on which Congress has focused considerable attention. See, *e.g.*, Gov't Br. 15-17; J.S. App. 7a, 15a; J.A. 16-17. The SSN requirement attacked in this case is a direct congressional response to those problems. In short, it cannot seriously be urged that the government lacks a compelling interest in ensuring that expenditures of nearly $20 billion per year (see Gov't Br. 9) are properly made.

The other cases on which appellees rely for the proposition that "the government's interest in the integrity of welfare funds" (Br. 21) is not compelling are readily distinguishable on at least

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[9] In *Stevens* v. *Berger*, 428 F. Supp. 896, 900-908 (E.D.N.Y. 1977), the court concluded that the government lacked a compelling interest in requiring AFDC applicants to supply SSNs, but the court confined its analysis to the governmental interest in requiring SSNs from the plaintiffs alone.

two separate grounds. First, the cases involved statutes that established arbitrary classification schemes rather than facially-neutral informational requirements. Second, the cases involved statutes that did not employ the "least restrictive means" of accomplishing the governmental interests at stake. This Court has never held, however, that the government lacks a compelling interest in verifying welfare eligibility and detecting fraud where, as here, that interest is achieved by a requirement that entails no classification of applicants and is precisely tailored to accomplish the governmental purposes.

In *Shapiro* v. *Thompson*, 394 U.S. 618 (1969), for example, the Court invalidated one-year residency requirements imposed on the receipt of welfare benefits. Noting that the states admitted their intent to deny benefits to as many people as possible, the Court began with the proposition that the states' desire to exclude indigents had no legitimate purpose (394 U.S. at 628). In these circumstances, the Court held that the classification of welfare applicants on the basis of length of residence constituted invidious discrimination that infringed upon the constitutional right to travel. "If a law has 'no other purpose . . . than to chill the assertion of constitutional rights by penalizing those who choose to exercise them, then it [is] patently unconstitutional' " (394 U.S. at 631 (quoting *United States* v. *Jackson*, 390 U.S. 570, 581 (1968)). Here, by contrast, the SSN requirement was not enacted to penalize the exercise of constitutional rights and does not have as its purpose the exclusion of any particular class of potential recipients. Congress and the states are willing to provide benefits to eligible individuals, so long as they agree to identify themselves in terms that the government can utilize in the administration of the programs.

The Court in *Shapiro* also rejected the states' asserted purpose of preventing fraudulent claims not because it found that interest to be insubstantial, but because it concluded that the one-year residency requirement was simply not well-suited to that purpose. Thus, the Court concluded that erroneous double payments could be prevented without resort to the "blunderbuss method of denying assistance to all indigent newcomers for an entire year" (394 U.S. at 637). Again, the SSN requirement is quite different. Rather than a "blunderbuss method" that

sweeps too broadly, it is precisely tailored to achieve the purpose of preventing and detecting fraud and abuse. In sum, the Court invalidated the durational residency requirements in *Shapiro* because it found that the states "do not * * * need to use the one-year requirement for the governmental purposes suggested." 394 U.S. at 638. The same cannot be said of the SSN requirement.[9]

Similarly, in *Graham* v. *Richardson*, 403 U.S. 365 (1971), the statutes at issue created two classes of needy persons, "indistinguishable except with respect to whether they are or are not citizens of this country" (403 U.S. at 371). It was for that reason, and not because of any denigration of the state interest in fiscal integrity, that the Court invalidated a classification scheme based on alienage. The SSN requirement, on the other hand, creates no classification scheme at all; it applies equally to all who seek benefits.[10]

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[9] In *Memorial Hospital* v. *Maricopa County*, 415 U.S. 250 (1974), the county relied on arguments virtually identical to those rejected in *Shapiro* to support a one-year residency requirement for the provision of free medical care. Not surprisingly, the Court rejected the arguments in precisely the same terms it had employed in *Shapiro*.

[10] The free speech cases relied on by appellees (Br. 22 n.16) are equally inapposite. In *Schneider* v. *State*, 308 U.S. 147, 164 (1939), the Court refused to permit local police to censor pamphlets with the intent of weeding out fraudulent appeals in the name of charity and religion. The Court's concern, of course, was to guard against the censorship of ideas based on their content. No such impermissible discretion is vested in officials administering the AFDC and Food Stamp programs. In *Torcaso* v. *Watkins*, 367 U.S. 488 (1961), the Court invalidated a provision of the Maryland Constitution requiring state officials to declare a "belief in the existence of God" (367 U.S. at 489). Quite clearly, no such "religious test" (*ibid.*) is involved in the SSN requirement. Finally, in *Village of Schaumburg* v. *Citizens for a Better Environment*, 444 U.S. 620 (1980), the Court concluded that less burdensome means existed to prevent fraudulent charitable solicitations than a flat ban prohibiting such activity by all groups that could not demonstrate that at least 75% of their receipts were used for charitable purposes. Of particular relevance to the instant case was the Court's observation that at least one feasible alternative was available through a provision of Illinois law requiring charitable organizations to register with the State Attorney General's Office and "to report certain information about their structure and fundraising activities." 444 U.S. at 638 n.12. Thus, far from suggesting that informational requirements are constitutionally infirm, the Court affirmatively endorsed their use as a valid means of promoting the governmental interest in preventing fraud.

Appellees also erroneously contend (Br. 23-26) that the government lacks a compelling interest in administrative efficiency. In large measure, appellees' argument is based on the apparent misconception that "administrative efficiency" is nothing more than a "bureaucratic craving for uniformity" (Br. 38). Clearly, the two are not the same. Rather, to the extent that uniformity is an issue, it is required to ensure that massive government programs are administered with the appearance and reality of evenhandedness and fairness, both for the participants in the programs and for the taxpayers funding those programs. Significantly, appellees have never denied that some sort of "system"—*i.e.*, something to promote administrative efficiency—is required to manage the programs at issue. Moreover, it cannot be denied that programs of the size here involved require a "system" that employs both computers and unique numerical identifiers. In these circumstances, it simply strains this Court's precedents too far to hold that appellees may require the government either to remove them from the "system" mandated by Congress or to devise an entirely separate "system" for handling their benefits.[11]

b. Once it is accepted that the government's interests in this case are compelling, it is clear that there simply are no "[less] restrictive means" (*Thomas* v. *Review Bd.*, 450 U.S. at 718) available to accomplish those interests. Before the government may be forced to abandon a facially-neutral informational re-

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[11] As with the cases relied upon by appellees to attack the governmental interests in preventing and detecting fraud, the cases appellees cite (Br. 24-26) to challenge the government's interest in administrative efficiency involved facially arbitrary classification schemes broader than necessary to achieve the stated objective, rather than a precisely-tailored and neutral informational requirement of the sort at issue here. See, *e.g.*, *Cleveland Bd. of Educ.* v. *LaFleur*, 414 U.S. 632 (1974); *Frontiero* v. *Richardson*, 411 U.S. 677 (1973); *Stanley* v. *Illinois*, 405 U.S. 645 (1972); *Carrington* v. *Rash*, 380 U.S. 89 (1965); *Spencer* v. *Rondell*, 357 U.S. 513 (1958).

Goldberg v. *Kelly*, 397 U.S. 254 (1970), also cited by appellees (Br. 25-26), involved only the procedures to be followed before welfare benefits may be terminated. Nothing in the decision suggests that the government's interest in fairly allocating such benefits must forever give way in the face of a continuing refusal on the part of a welfare recipient to comply with administrative procedures that fully comport with due process.

quirement such as the SSN provision—even for one individual—it must be shown that there exists an alternative that will be equally effective, *i.e.*, an alternative that works as well as the one already chosen by Congress.[14] As even the district court was forced to acknowledge (J.S. App. 20a-21a), however, exempting Little Bird of the Snow from the SSN requirement will diminish the government's ability to perform effective computer cross-matching, especially in situations involving records located in more than one state. Thus, exempting Little Bird of the Snow from the SSN requirement is not an "alternative" at all; it simply represents the district court's judgment that the government's compelling interests in verifying eligibility and detecting fraud and abuse must be compromised by eliminating the tool that Congress has determined to be the single most effective method of accomplishing those goals. This Court has never held that the "least restrictive means" analysis is to be applied in such a fashion.

c. Notably, this Court itself requires the use of SSNs in processing applications for admission to the Bar of the Supreme Court. In *Bornstrager* v. *Stevas*, 772 F.2d 419 (8th Cir. 1985), cert. denied, No. 85-719 (Dec. 2, 1985), the Clerk of this Court declined to process the application for admission to the Bar of this Court of a lawyer who refused on religious grounds to provide his SSN in the space reserved for that number on the application form. Although Bornstrager's suit against the Clerk was dismissed on procedural grounds, the reasons advanced by the Clerk for requiring applicants to provide their SSNs are remarkably similar to the governmental interests served by the

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[14] We do not mean to suggest that the alternative must be the one that is most "convenient" for the government. Clearly, the Court's decisions in *Thomas* and *Sherbert*, requiring the states to grant unemployment benefits to persons unavailable for work because of their religious beliefs, made it more difficult to administer the benefit programs than was the case under the states' preferred method of excluding all religious objectors from eligibility for benefits. But the states still could achieve their interest in preventing fraudulent religious claims by evaluating each claim on its own merits. Thus, the states' purposes could be accomplished without resort to a "blunderbuss method" (*Shapiro* v. *Thompson*, 394 U.S. at 637) of blanket exclusions. The availability of this equally effective alternative serves to distinguish *Thomas* and *Sherbert* from the instant case. See also Gov't Br. 38.

SSN requirement in the administration of the AFDC and Food Stamp programs. In his memorandum in support of his motion to dismiss or for summary judgment (at 12), the Clerk noted that the SSN requirement serves the Court's interests in a variety of ways:

> It helps detect and prevent fraud by persons who are not qualified to gain admission to the Bar of the United States Supreme Court who might otherwise be admitted. It helps assure that disciplinary actions by the Supreme Court will not be mistakenly directed at the wrong person. It provides a means of easily verifying whether the person is a member of other courts' bars and the status of that membership. * * * Some type of precise identifier is very important to protect the public interest in regulating membership of the bar.

At the time of the district court litigation in *Bornstrager*, the Clerk stated that there were approximately 160,000 members of the Supreme Court Bar. Aff. of Alexander Stevas, ¶ 2, filed in support of motion to dismiss or for summary judgment. By contrast, there are, as noted in our opening brief (at 9), nearly four million families, with a total of more than 11 million persons, receiving AFDC payments each month, while approximately 20 million persons receive food stamps each month. If this Court requires SSNs to keep track of the attorneys admitted to practice before it, it should be self-evident that the government requires unique personal identifiers to keep track of AFDC and Food Stamp recipients.

3. Finally, appellees are unable to offer any satisfactory rationale to justify the district court's issuance of an injunction prohibiting Secretary Heckler (now Secretary Bowen) from "using or disseminating" the SSN that was assigned to Little Bird of the Snow at the request of her mother, appellee Miller. Appellees argue (Br. 47) that the Court should not reach the issue because the government did not raise it below. This contention is plainly wrong. First, it was not until the entry of the injunction itself that the government knew what form of relief would be granted. At that point, of course, the government did "object," by taking an appeal to this Court. Second, the government made it clear in the district court that it did not think that

any injunction should issue (J.A. 512). That position necessarily subsumed an objection to an injunction against governmental use or dissemination of Little Bird of the Snow's pre-existing SSN. Finally, there is no merit to appellees' speculation (Br. 47) that a more specific objection from the government would have induced the district court to order "expungement" of Little Bird of the Snow's SSN. More important, however, is the fact that even if appellees' supposition were correct, the government would have appealed any such order as well.

On the merits of this issue, appellees argue (Br. 47-48) that their religious beliefs would be equally infringed by governmental use of Little Bird of the Snow's SSN as by appellees' own compliance with the SSN requirement, reasoning that it would be appellees' act of applying for benefits that would trigger the government's use of Little Bird of the Snow's SSN. This recharacterization of appellees' objection does not advance their case.[13] Appellees cite no authority for the proposition that the Free Exercise Clause enables religiously-motivated citizens to force government to restructure the manner in which it conducts its own business. Moreover, by its own terms, the district court's injunction is not limited to governmental "use" or "dissemination" of Little Bird of the Snow's SSN that is arguably triggered by the actions of appellees. Instead, *any* use or dissemination has been permanently enjoined, no matter what the triggering cause. J.S. App. 24a. In addition, the district court ordered the Secretary of HHS to demand that all other entities, governmental and private, refrain from using or disseminating Little Bird of the Snow's SSN (*id.* at 25a).[14] Thus, for example, the injunc-

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[13] Appellees' complaint sought to enjoin the government from denying AFDC or Food Stamp benefits "to Little Bird of the Snow for failure to provide a Social Security Number" (¶ 19 A, B; *see also* ¶ 28 A) (emphasis added). Appellees made no separate claim that the use or dissemination of an SSN already in the government's possession would violate their Free Exercise rights. Of course, the complaint was filed prior to the surprise revelation that Little Bird of the Snow's mother had in fact obtained an SSN for her and at a time when appellees were still falsely maintaining that she did not have one (*see* J.A. 13 (¶ 6)).

[14] This aspect of the district court's injunction does not expire on Little Bird of the Snow's 16th birthday; instead, it is permanent by its own express terms. J.S. App. 24a.

tion now in effect requires the Secretary to "demand" that the Internal Revenue Service permanently refrain from employing Little Bird of the Snow's SSN to determine whether she has unearned income from bank accounts on which back taxes are owed. There is no conceivable rationale for such unprecedented interference with the operations of government.

For the foregoing reasons, as well as those set forth in our opening brief, the judgment of the district court should be reversed.

Respectfully submitted.

CHARLES FRIED
Solicitor General

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